No. 79-6853

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

LEAH LYNN PARRISH WEBB,

Petitioner,

v.

JAMES THOMAS WEBB,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

REPLY BRIEF OF PETITIONER

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These Circuit Courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus and warrants, certiorari, prohibition and habeas corpus, and all writs necessary and proper to complete exercise of their jurisdiction.

IN THE

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ARGUMENT

I.

RESPONDENT'S CHARACTERIZATION OF THE EVIDENCE FROM THE RECORD AND TRANSCRIPT BELOW IS MISLEADING.

Respondent's statement of the case, particularly his recitation of evidence before the Georgia trial court, is misleading. Rather than the sympathetic response of a parent to an emergency as portrayed by Respondent, the true

evidence paints a more traditional picture of parental "child snatching" by Respondent.

First, it is clear from Respondent's own testimony that he had considered securing physical possession of the minor child, Shane, long in advance of any of the alleged events on February 17th and 18th, 1979. [T.32,60]. In fact, he had stopped paying child support to the Petitioner over one month prior to the alleged "emergency" in anticipation of getting physical custody. [T.32,59,60].

Second, the only evidence of any "emergency" was Respondent's own testimony at the Georgia hearing. There was no corroboration of any of Respondent's assertions concerning receipt of a telex message about the child, nor was there any confirmation by any law enforcement, juvenile court or social service officer, neighbor or other person in Georgia or Florida of the existence of any unusual circumstances which would justify the Respondent's removal of the child from Florida. The absence of any corroborative witnesses is particularly revealing when one considers that Respondent and his attorney had arranged for the date and time for the hearing in Georgia almost two months in advance and could have easily arranged for local or Florida law enforcement, juvenile or social services personnel whom he alleged to have been involved, to testify in verification of his recounting of events.

In addition, Respondent did not appear in or contest Petitioner's action in Florida, where evidence from the very law enforcement officials and social services personnel allegedly consulted would have been readily available. Even at the time of the Georgia trial court hearing, it was Respondent's insistence upon compliance with a local court rule restricting testimony to that of the parties which effectively hindered the Georgia court from having access to

testimony of any witness who could corroborate or rebut the assertions of either party. [T.19,20].

Furthermore, Respondent's own testimony at trial failed to show any real emergency justifying his actions in taking the child back to Georgia. Respondent himself testified that once he reached Gainesville, Florida, he found the minor child with the next door neighbors [T.24,25]; ironically, the same neighbors whom according to Petitioner's testimony she had pre-arranged to care for Shane and his step-sister during her two day trip out of town. [T.89,90]. The same neighbors were cousins of the Petitioner and both knew the destination of Petitioner and how to reach her if any problem arose. [T.87-90,106].

Therefore, Respondent himself did not find the child ill, injured or in danger from lack of adult supervision. There is no evidence to support his assertion in his brief[1] that the minor child or his step-sister were taken to these neighbors by any mode other than the pre-arrangement of the Petitioner. [T.90,106]. Certainly Respondent did not testify at trialnor offer testimony from any witness to show that any law enforcement, juvenile or social work personnel placed Shane and his step-sister with the neighbors. Furthermore, there is no evidence, even if one accepts Respondent's testimony, that he contacted various Florida authorities, that these authorities specifically gave him permission or advised him to take the minor child back to Georgia as alleged in Respondent's brief. Even at trial Respondent only testified that he talked with the juvenile officer from the Alachua County Sheriff's Office and with the Division of Family Services, not that they gave him permission to pick up the child. [T.23,24].

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[1]Brief of Respondent, *Webb v. Webb,* (No. 79-6853, Supt.Ct. of the U.S.) p. 2.

Respondent also mischaracterized Petitioner's appearance before the Georgia court as submitting to the jurisdiction of that court.[2] Nothing is further from the facts. Petitioner objected to both subject matter and personal jurisdiction in her first pleading, the Motion to Dismiss and Answr [J.A.27-31], orally at the Georgia trial court hearing [T.6-7] and again in her Enumeration of Errors and brief before the Georgia Supreme Court [J.A.44]. Making a general appearance and defending on the merits of an action does not constitute submission to or waiver of jurisdiction where jurisdictional objections are specifically and timely raised in the party's first pleading. *Ga. Code* §81A-112(b) & (h), *Weems v. Weems,* 225 Ga.154,166 S.E.2d 352 (1969).

II.

CERTIORARI REVIEW BY THIS COURT IS APPROPRIATE AND TIMELY.

A. Petitioner Adequately and Timely Raised Her Constitutional Issue.

Respondent in his brief has urged this Court to dismiss certiorari on the basis that the Petitioner failed to adequately raise the constitutional issue below.[3] Appellant, however, asserts that she raised the constitutional issue in conformance with standards articulated by this Court and Georgia law.

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[2]*Id.* at 3.

[3]Brief of Respondent, *supra,* at 9.

There appear to be two standards articulated by this Court, as well as by Georgia courts, which must be met in raising a constitutional issue. First, the litigant must raise the issue at the earliest feasible time in the lower court. Second, the constitutional claim must be raised with fair precision. *New York ex. rel. Bryant v. Zimmerman,* 278 U.S.63,67 (1928).

There is no question that Petitioner timely raised the issue. In her Amendment Prior to Entry of Pre-Trial Order filed on April 26, 1979, she requested that the Superior Court of Berrien County, Georgia accord full faith and credit to the order of the Circuit Court of Alachua County, Florida rendered just days before. [J.A.27-31]. When the trial court failed to give the judgment full faith and credit, Petitioner raised the error in her Enumeration of Errors (No.VI) in the Georgia Supreme Court [J.A.45]. Furthermore, despite Respondent's assertions otherwise, Petition did supply the court with argument in support of the Enumeration of Error in Part III of Petitioner's Brief in compliance with *Ga. Code* §24-4545.[4]

Secondly, it is also clear that Petitioner raised the constitutional issue below adequately pursuant to both decisions of this Court and Georgia courts. Although some early cases decided by this Court and state courts required very specific pleading to raise a constitutional issue, more recent case law demonstrates that a litigant is not bound to follow any particular form of words or phrases as long as he brings the federal claim and the grounds therefore to the attention of the state court and in due time. *New York, ex.*

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[4]Appellant's Brief, *Webb v. Webb,* (Sup.Ct., State of Ga., Case No. 35703) at p. 20.

rel. Bryant v. Zimmerman, supra.[5] "If the record as a whole shows either expressly or by clear intendment that this was done, then this Court has regarded the claim as having been adequately presented." *supra.*

In *Braniff Airways v. Nebraska State Board of Equalization and Assessment,* 347 U.S.590 (1954), this Court held that where the airline timely raised and preserved its contention that its property was not taxable in Nebraska because such property had attained no taxable situs in that state, that this Court would consider such contention, even though the airline erroneously relied upon the Commerce Clause to support its claim, and failed to specifically claim protection under the due process clause. "Though inexplicit, we consider the due process issue within the clear intendment of such contention." *supra.*

Since Respondent timely raised her constitutional issue and since Respondent specifically noted the correct provisions of the United States Constitution in requesting that "full faith and credit" be given to the Florida decree, all that is apparently referred to by the Respondent is that Petitioner did not set out the location of the Full Faith and Credit Clause in Article IV, Section I (of the United States Constitution) in her earlier pleadings in state court. There being no full faith or credit clause or similar language in the Georgia Constitution, there could be no mistake made by the Georgia courts as to the source of the Full Faith and Credit Clause in the United States Constitution nor could the Georgia courts have misconstrued the nature of a claim that

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[5]Georgia courts have required a particularized form of pleading constitutional issues, but only where the constitutionality of a state statute or municipal ordinance is brought into question. *Persons v. Banks,* 207 Ga. 384, 61 S.E.2d 832 (1950); *Stembridge v. State of Georgia,* 343 U.S.541 (1952).

full faith and credit be accorded to foreign judgments as being based on Article IV, Section I. Furthermore, it is apparent that in other cases before this Court that the failure to cite to a specific constitutional citation in the lower courts where the nature of the constitutional claim was clear is not fatal to review in this Court.[6]

B. The Passage of the *Parental Kidnaping Prevention Act* should not Impede Review of the Case.

It is clear that the *Parental Kidnaping Prevention Act* of 1980, 28 U.S.C. §1739A passed by Congress and signed into law in December, 1980 is not applicable to this case or any other case involving this issue until July 1, 1981. In reality, that portion of the *Parental Kidnaping Prevention Act* specifically extending full faith and credit to child custody orders seem unnecessary in that there is no language at present in either Article IV, Section I of the *United States Constitution* or in federal law enacted pursuant to this constitutional provision which denies full faith and credit to final custody determinations.

The specific application of the new law to cases such as the one presently before this Court is now largely speculative since the Act's provisions, as well as the Congressional authority to enact this specific legislation, has never been reviewed or interpreted by this or any other court, and such review and interpretation may be many years off.

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[6]*Dyke v. Taylor Implement Manufacturing Company,* 391 U.S. 216,217 n.3 (1968); *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment,* 347 U.S.590,598-599 (1945); *Gibbs v. Burke,* 337 U.S.773,779 (1948).

Therefore, the most that can be said for the *Parental Kidnaping Prevention Act,* at present, is that it is clearly a strong Congressional statement in support of the extension of the Full Faith and Credit Clause to custody orders rendered pursuant to principles of subject matter and personal jurisdiction present in the Circuit Court of Alachua County, Florida in this case. Such express Congressional sentiment should serve to foster, not impede, review of this case at this time.

III.

THE CIRCUIT COURT OF ALACHUA COUNTY, FLORIDA ASSUMED SUBJECT MATTER JURISDICTION CONSISTENT WITH FLORIDA LAW AND ITS INTERPRETATION BY FLORIDA APPELLATE COURTS.

Respondent and the Amicus Curiae for the National Conference of Commissioners on Uniform State Laws argue for the first time in their briefs before this Court, that the Circuit Court of Alachua County, Florida lacked subject matter jurisdiction to modify the original Georgia custody decree.

Such argument, however, is based upon three erroneous assumptions: first, that the Uniform Child Custody Jurisdiction Act has a uniform construction binding on all state courts whose legislatures adopted its principles; second, that the Uniform Child Custody Jurisdiction Act's provisions create the power of "continuing" or "exclusive" jurisdiction in a court in which an original decree is rendered to modify its own decree regardless of the subsequent domocile of the

parties and the minor child; and, third, that the duty of the trial court to confer with other courts pursuant to *West's F.S.A.* §61.1314 and *Ga. Code* §74-507 is in this case applicable to the Circuit Court of Alachua County, Florida, but not to the Superior Court of Berrien County, Georgia.

A. The Uniform Child Custody Jurisdiction Act Once Adopted by a State is Subject Only to the Binding Interpretation of Its Own Courts Absent Infringement of Constitutional Protections.

Although the Uniform Child Custody Jurisdiction Act is a model act, once its provisions have been adopted by a state, it becomes that state's law and is, therefore, subject only to the binding construction of that state's courts unless principles of the United States Constitution or federal law are infringed. The UCCJA, like all model acts, has been interpreted widely by courts in the adopting states, and many of the interpretations of the various sections are different and occasionally conflicting.[7]

The notes of the Uniform Commissioners interpreting the UCCJA were not adopted by either Florida or Georgia and although often referred to by the Respondent and Amicus Curiae as binding authority are nothing more than a suggested interpretation.

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[7]See 96 *ALR* 3rd 968.

B. The Circuit Court of Alachua County Correctly Interpreted the Provisions of Florida Law in Exercising Subject Matter Jurisdiction.

The UCCJA provisions for modification of a custody decree are set out in Florida Law at *West's F.S.A.* §61.133:

> (1) If a court of another state has made a custody decree, a court of this state shall not modify the decree unless:
>
> (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this act or has declined to assume jurisdiction to modify the decree, and
>
> (b) the court of this state has jurisdiction.

Pursuant to the actual wording of the above section and its interpretation in Florida, it was easy for the Florida court to determine it had jurisdiction to modify the custody decree at issue. (Since Georgia's UCCJA only became effective January 1, 1979, there was no Georgia case law at that time to which the Florida court could refer to determine its consistency with Florida law.)

First, the Florida court could easily determine that the Superior Court of Berrien County, Georgia had no "continuing" or "exclusive" jurisdiction as the court rendering the original decree to modify the decree at that time. It is abundantly clear in Georgia law that its courts can exercise no continuing jurisdiction to modify, change, or even interpret their own decrees; once a Georgia court renders a custody, divorce or other order of decree, any action to modify, construe, or in any way change the decree must be a new action based on determinations of subject matter jurisdiction, personal jurisdiction, and venue wholly related to the facts of the parties' domocile and service at the time of the new action. *Bragg v. Bragg,* 224 Ga.733,164 S.E.2d

560 (1968); *Smith v. McDaniel,* 219 Ga.208,132 S.E.2d 78 (1963); *Glover v. Sink,* 230 Ga.81,195 S.E.2d 443 (1973); *Anthony v. Anthony,* 212 Ga.356,92 S.E.2d 857 (1956); and *Munday v. Munday,* 152 Ga.App.232,263 S.E.2d 543 (1979).[8]

There is nothing in the actual wording of any provision of the UCCJA adopted in Georgia which has the effect of granting a court in Georgia (or Florida) which renders an initial custody decree authority to exercise "continuing" or "exclusive" jurisdiction to monitor and modify a decree where heretofore the law of the state did not provide such jurisdiction. In fact, Florida courts, which in the past maintained continuing jurisdiction to modify, construe and monitor their custody decrees, have found that this very exercise of "continuing" or "exclusive" jurisdiction is in conflict with the principles of the UCCJA, and, therefore have held such doctrine was repealed by the UCCJA. *Hegler v. Hegler,* 383 So.2d 1134 (Fla.App. 1980), *Detko/ Roberts v. Stikelether,* 370 So.2d 383 (Fla.App. 1979),

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[8]It should be noted that neither Respondent nor Amicus Curiae for the National Conference of Commissioners on Uniform State Laws could point to one Georgia case authority to corroborate their assertion that the Superior Court of Berrien County, Georgia, could exercise continuing or exclusive jurisdiction to modify its custody decrees. Even the Georgia Supreme Court in its opinion below, did not base jurisdiction on such grounds. [J.A.48-51].

Matteson v. Matteson, 370 S.2d 677 (Fla.App. 1980).[9]

In *Hegler,* factually similar to this case, the parties were divorced in Florida in 1973, and the wife was given custody of the two minor children.

In December, 1976, the wife moved to Maryland with the children. In July, 1978, the husband went to Maryland, took one of the children, and returned with the child to Florida. The wife then filed contempt proceedings in Florida alleging violations of the order's custody and support provisions. Appellee filed defenses and a petition to modify custody of both children. The Florida trial court found it had jurisdiction to modify custody because it was the court of "original jurisdiction" in the case and gave custody of the children to the husband. The Florida District Court on appeal found that Maryland had become the children's home state and held that "the fact that the original decree was entered in Florida does not prevent loss of jurisdiction if the children have resided elsewhere for six months." The court further

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[9]Also, note a similar interpretation has been adopted in Maryland, Kentucky and recently Illinois. In *Howard v. Gish,* 373 A.2d 1280 (Md.Ct. of App. 1977) the court noted that the UCCJA makes it plain that "adherence to the continuing jurisdiction rule" are to the extend of any inconsistency with the [Act] no longer of controlling authority. *Turley v. Griffin,* 508 S.W.2d 764 (Ky.Ct. of App. 1974) acknowledged that notwithstanding the fact its court rendered the final judgment for dissolution, "the provisions of the Act clearly provide that after [the mother] and the child moved to Indiana this state was divested of jurisdiction to make a child custody determination as the home state." As noted in a subsequent Kentucky case, *Honigsberg v. Goad,* 550 S.W.2d 471 (Ky.Sup.Ct. 1976) the court rendering the divorce "cannot retain indefinite jurisdiction over the custody of the children." In *Siegal v. Siegal,* No. 53256 (Ill.Sup.Ct., decided January 20, 1981), Illinois also found the exercise of continuing jurisdiction to modify custody inconsistent with UCCJA principles when Illinois was no longer the home state of the minor children.

found that the UCCJA specifically supercedes prior law in Florida recognizing custody decrees as interlocutory in nature and subject to the continuing jurisdiction of the court rendering the original decree. *Id.* at 1136.

The facts in *Detko/Roberts v. Stikelether, supra,* were also similar to the present case. The parties were divorced in Florida in 1976. The minor child whose custody was awarded to the mother moved with her mother to Alabama thereafter. In 1977, the father petitioned in a Florida court for visitation rights, and the Florida court granted visitation rights. Thereafter, the mother petitioned in Alabama for a change in the visitation rights awarded to the father. Prior to the Alabama hearing, the father took the child to Florida and petitioned for custody. The mother counterclaimed for writ of habeas corpus and asked for dismissal of the petition. The trial court in Florida found it had subject matter and personal jurisdiction, and the mother filed an interlocutory appeal. The Florida District Court, on appeal, reversed the lower court's finding of jurisdiction to modify, holding that at the time the trial court in Florida commenced dealing with the post divorce visitation rights and custody, the mother and the minor child had been residents of Alabama for more than six months. Therefore, pursuant to *West's F.S.A.* 61.1308 1(a)(1), Alabama was the home state and alone had jurisdiction.

The Florida District Court in *Matteson v. Matteson, supra,* made the same determination, finding that simply because the original dissolution and subsequent modification was in Florida does not mean Florida retains jurisdiction where the children and the wife have resided in New York for over three years, and where the New York court was willing to assume responsibility for modification of custody.

Secondly, once the Florida court determined the Georgia court no longer retained any jurisdiction to modify its

custody order, it was easy to determine that the Florida court had jurisdiction to modify as the child's home state. In the minor child's life in six years he had resided in Florida over four years; furthermore, at the time of his removal from Florida, he had resided in that state fifteen of the seventeen months from the date of the original divorce and custody decree. [J.A.11-12]. Clearly, there is no doubt that Florida was both the child's home state and the state having the most significant connection with him pursuant to UCCJA principles incorporated in Florida law at *West's F.S.A.* §61.1308.

C. The Circuit Court of Alachua County, Florida was not Required by Florida Statutes to Decline Jurisdiction where a Proceeding was Commenced in Georgia over Two Weeks after it Accepted Jurisdiction of the Case.

Floria statutes, codified at *West's F.S.A.* §61.1314 require that a Florida court "shall not exercise its jurisdiction" under the provisions if, "*at the time the petition is filed,* a proceeding concerning the custody of the child was pending in a court of another state. . .". (emphasis supplied) As is abundantly clear from the record, the petition in Florida was filed on March 8, 1979, and the petition in Georgia was not filed until March 23, 1979. Therefore, there was no Georgia proceeding pending at the time of the Florida court's initial exercise of jurisdiction when Petitioner's Petition to Establish, Enforce and Modify a Foreign Judgment was filed, the Motion for Emergency Restraining Order was considered, and the Restraining Order was signed.

There is nothing in the entire UCCJA which requires a court which exercises jurisdiction in substantial conformity

with the Act to dismiss jurisdiction simply because a court in a second state subsequently asserts jurisdiction. In fact, under the same UCCJA principles codified at *Ga. Code* §74-507, the Georgia court, having determined by Petitioner's Answer that a proceeding was pending in Florida at the time Respondent filed his Complaint in Georgia, was the only court under the duty pursuant to this UCCJA provision to refuse to assert or to dismiss jurisdiction. *Paltrow v. Paltrow,* 37 Md.App.191,376 A.2d 1134, *aff'd* 388 A.2d 547, *In Re McDonald,* 74 Mich.App.119,253 N.W.2d 678.

D. The Florida Court's Assumption of Subject Matter Jurisdiction, being Consistent with Florida Law Interpreting the UCCJA is Not Subject to Collateral Attack in this Court.

In the case of a collateral attack on a domestic judgment of a court of general jurisdiction, every reasonable presumption will be indulged in support of the regularity and validity of the judgment. *Kalb v. Fuerstein,* 308 U.S.433 (1940); *Johnson v. Zerbst,* 304 U.S.458 (1938). Furthermore, a default judgment is as conclusive against collateral impeachment as any other form of judgment.

As previously demonstrated, Respondent and one amicus curiae have argued not that the Circuit Court of Alachua County, Florida erred in the exercise of subject matter jurisdiction based upon Florida case law interpreting its own statutory version of the UCCJA, but rather that the Florida trial court erred in not applying an interpretation of the UCCJA endorsed by some commentators of the UCCJA. Certainly it would have been appropriate for Respondent on appeal from the Florida order in that state's appellate courts

to urge that Florida case law interpreting UCCJA provisions be overturned as inconsistent with various commentators on the Act, but having failed to urge this argument before the Florida courts on appeal, Respondent cannot now utilize this argument to collaterally attack the Florida order before this Court on lack of subject matter jurisdiction.

Although the absence of subject matter jurisdiction may in certain cases render a judgment void, this voidness occurs only where there is a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority. *Stoll v. Gottlieb,* 305 U.S.165 (1938). Voidness does not occur when there is simply an error in interpreting a statutory grant for the exercise of jurisdiction. *Ludden v. Selective Services System,* 453 F.2d 645,649 (1st Cir. 1978).

It is unchallenged that the Circuit Court of Alachua County, Florida was a court having plenary jurisdiction in matters of modification of child custody orders.[10] Therefore even if one assumed, for the sake of argument only, that the Floria court erred somewhat in interpreting the statutory grant of jurisdiction pursuant to the UCCJA based on the facts and residence of the parties, such error is nevertheless not equivalent to that court's acting with a total want of jurisdiction. The error in interpreting the UCCJA provisions would have made the Florida order attackable on direct appeal, but would not render the judgment a complete nullity and subject to collateral attack. *Chicot County Drainage District v. Baxter State Bank,* 308 U.S.371,376-377 (1940), *Nobel v. Union River Logging Co.,* 147 U.S.165 (1893), *Kansas City Southern Railway Co. v. Great Lakes Carbon Corp.,* 624 F.2d 822 (8th Cir. 1980).

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[10]Florida Constitution, Art. 5, *West's F.S.A.* §26.012. Also see *In the Interest of Wendy Dee Peterson,* 364 S.2d 98,99 (Fla.App. 1978).

In summary, the Circuit Court of Alachua County, Florida exercised subject matter jurisdiction consistent with Florida appellate court's interpretation of the Uniform Child Custody Jurisdiction Act. Even if, however, the Circuit Court misinterpreted Florida law in assuming jurisdiction based on the particular set of facts involved in this case, such an error in interpretation does not render the order void and subject to collateral attack where the court had general jurisdiction over child custody matters.

IV.

THE FLORIDA ORDER HAD THE REQUISITE FINALITY FOR ENTITLEMENT TO FULL FAITH AND CREDIT IN GEORGIA COURTS.

A. The UCCJA, When Adopted in Florida, Changed Previous State Law as to Finality of Custody Decrees.

Respondent and Amicus Curiae for the National Conference of Commissioners argue that the Florida courts, now as well as at the time of *New York ex. rel. Halvey v. Halvey,* 330 U.S.610 (1947), treat custody decrees as interlocutory and may modify such decrees from time to time as the welfare of the child requires.

As stated previously in Petitioner's Main Brief, the UCCJA, once adopted in Florida has, however, superceded and repealed the prior law of Florida explained and cited in the briefs of Respondent and amicus curiae. *Hegler v. Hegler,* 383 So.2d 1134, 1136 (Fla.App. 1980). UCCJA provisions specifically provide that a custody decree is

"conclusive *as to all issues of law and fact and as to the custody determination made...*". (emphasis added). *West's F.S.A.* §61.1326. Therefore, in absence of or in addition to findings of law and fact, specifically articulated in a custody order, the custody determination in and of itself also has a conclusive or res judicata effect.

B. The Florida Custody Order was Res Judicata as to Findings of Fact and Law and as to the Custody Determinations Made.

Respondent and Amicus Curiae for the National Conference of Commissioners on Uniform State Laws apparently argue that the Florida order was not entitled to full faith and credit in Georgia because the Florida court issuing the order did nothing more than recognize and enforce the existing Georgia decree.

The record from the Circuit Court of Alachua County, Florida shows otherwise. First, the Florida court received evidence from Petitioner in the form of pleadings, affidavits and oral testimony respecting the residence of the parties, the residence of the child during almost his entire life and evidence concerning the removal of the child from Florida without the consent or knowledge of Petitioner. [J.A.6-10,11-12,17-18,25-26].

Secondly, the Florida court, established the Georgia decree as a judgment of the Florida court, both pursuant to authority under the UCCJA, but also pursuant to Florida law relating to the domestication of foreign decrees.[11] But,

[11]Florida law has long provided that a foreign judgment can be domesticated as a decree of the State of Florida after notice and a hearing. Furthermore, with judgments having a future effect, either party may request in the same proceeding the modification of the judgment as it relates to future payments or effects. Once domesticated the foreign judgment becomes the judgment of the Florida court and is entitled to enforcement by legal and equitable means. *Sackler v. Sackler,* 47 So.2d 292 (Fla.S.Ct. 1950).

the Florida court did not stop there.

In addition to hearing evidence and establishing the Georgia decree, the Florida court made findings of fact and conclusions of law. The court determined that it had jurisdiction over the parties and subject matters of the action, that the Petitioner and minor child were permanent, bona fide residents of the State of Florida, not withstanding the minor child's physical presence then in Georgia, and that it was in the best interests of the child that the visitation rights in the Georgia decree be modified. [J.A.25-26].

Last and most important, the Florida court also made two custody determinations.[12] First, the court modified Respondent's visitation rights by setting forth a specific schedule for the exercise of visitation. Second, the court specifically ordered that the remainder of the provisions in the previous Georgia judgment, including Petitioner's award of custody of the minor child "*shall remain* in full force and effect." [J.A.26] (emphasis added). The court thereby made a present determination that the minor child was properly in the custody of Petitioner and should remain there based on facts existing at that time.

Thus, it is apparent that the Florida court did far more than simply recognize and enforce the 1977 Georgia divorce decree. The Florida order made two independent custody determinations, which along with the order's findings of fact and conclusions of law were entitled to conclusive and binding effect by Florida law.[13]

The fact that the Florida court issued the order upon the

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[12]"custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; *West's F.S.A.* §61.1306.

[13]*West's F.S.A.* §61.1326.

default of the Respondent does not reduce the order's conclusive effect. As stated by this Court in *Morris v. Jones,* 329 U.S.545 (1947), a judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata in the absence of fraud or collusion, even if obtained upon default.

Furthermore, unlike the normal default judgment, the court here clearly demonstrated that it exercised independent judgment concerning the best interest of the child; the Florida order did not simply parrot Petitioner's prayer for relief, particularly those for restrictions on visitation, but rather spelled out in its own terms its holdings including a specific and liberal visitation schedule for Respondent. [J.A.25,26].

C. The Custody Determination Made by the Florida Court could not be Modified without Evidence of a Substantial Change of Conditions.

As articulated by this Court in *Halvey*[14] and *Kovacs v. Brewer,*[15] the state of the forum has as much leeway to disregard the judgment, to qualify it or to depart from it as does the state where it was rendered. Since the enactment of the UCCJA in Florida, Florida courts may modify a custody order only upon evidence of a substantial change of conditions affecting the welfare of the child since the time of the previous order.[16]

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[14]*New York ex. rel. Halvey v. Halvey,* 330 U.S.610 (1947).

[15]*Kovacs v. Brewer,* 356 U.S.604 (1958).

[16]*Hegler v. Hegler,* 383 So.2d 1134, 1136 (Fla.App. 1980), *Stricklin v. Stricklin,* 383 So.2d 1183 (Fla.App. 1980).

The Superior Court of Berrien County, Georgia, therefore, had leeway only to modify custody based on evidence of changed circumstances since the Florida order rendered three weeks prior to the Georgia hearing. Since there was no evidence of changed circumstances introduced by Respondent relating to that three week period, the Georgia court erred in not granting full faith and credit to the Florida order.

CONCLUSION

The question presented for review has been timely and adequately raised in the courts below to sustain the acceptance of the writ of certiorari by this Court. Furthermore, the passage of the Parental Kidnaping Prevention Act of 1980, P.L. 96-611, not being effective until July 1, 1981, should not affect the grant of review by this Court in the present case.

It is clear that full faith and credit should have been accorded to the custody order of the Circuit Court of Alachua County, Florida. The Florida court had both subject matter jurisdiction pursuant to Florida law and personal jurisdiction over the parties. In addition, the custody order rendered had the requisite finality for the application of the Full Faith and Credit Clause mandates.

Therefore, the grant of the writ of certiorari by this Court should be sustained, and this Court should reverse the

decision of the Supreme Court of Georgia which failed to accord full faith and credit to the child custody order of its sister state, Florida.

Respectfully submitted,

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APPENDIX

PARENTAL KIDNAPING PREVENTION ACT OF 1980 PL 96-611

[Wallop unprinted amendment No. 1937 to HR 8406, establishing a national system for locating parents and children who travel from one jurisdiction to another and are concealed in connection with disputes between persons claiming rights of custody and visitation of children under the laws.]

SHORT TITLE

Sec. 6. Sections 6 to 10 of this Act may be cited as the "Parental Kidnaping Prevention Act of 1980."

FINDINGS AND PURPOSES

Sec. 7. (a) The Congress finds that

(1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts, of different States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, are often inconsistent and conflicting;

(3) those characteristics of the law and practice in such cases, along with the limits imposed by a Federal system on the authority of each such jurisdiction to conduct investigations and take other actions outside its own boundaries contribute to a tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities; and

(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the welfare of children and their parents and other custodians.

(b) For those reasons it is necessary to establish a national system for locating parents and children who travel from one such jurisdiction to another and are concealed in connection with such disputes, and to establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions.

(c) The general purposes of sections 6 to 10 of this Act are to—

(1) promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child;

(2) promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child;

(3) facilitate the enforcement of custody and visitation decrees of sister States;

(4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships of the child;

(5) avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; and

(6) deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

FULL FAITH AND CREDIT GIVEN TO CHILD CUSTODY DETERMINATION

Sec. 8. (a) Chapter 115 of title 28, United States Code, is amended by adding immediately after section 1738 the following new section:

§1738A. Full faith and credit given to child custody determinations

"(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

"(b) As used in this section, the term—

"(1) 'child' means a person under the age of eighteen;

"(2) 'contestant' means a person, including a parent, who claims a right to custody or visitation of a child;

"(3) 'custody determination' means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

"(4) 'home State' means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

"(5) 'modification' and 'modify' refer to a custody determiination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

"(6) 'person acting as a parent' means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

"(7) 'physical custody' means actual possession and control of a child; and

"(8) 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

"(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if —

"(1) such court has jurisdiction under the law of such State; and

"(2) one of the following conditions is met:

"(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

"(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

"(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

"(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is an issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

"(E) the court has continuing jurisidction pursuant to subsection (d) of this section.

"(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of

subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

"(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

"(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

"(1) it has jurisdiction to make such a child custody determination; and

"(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

"(f) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination."

(b) The table of sections at the beginning of chapter 115 of title 28, United States Code, is amended by inserting after the item relating to section 1738 the following new item:

"1738A. Full faith and credit given to child custody determinations."

(c) In furtherance of the purposes of section 1738A of title 28, United States Code, as added by subsection (a) of this section, State courts are encouraged to—

(1) afford priority to proceedings for custody determinations; and

(2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A, necessary travel expenses, attorneys' fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination in any case in which—

(A) a contestant has, without the consent of the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A, (i) wrongfully removed the child from the physical custody of such person, or (ii) wrongfully retained the child after a visit or other temporary relinquishment of physical custody; or

(b) the court determines it is appropriate.